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Supreme Court, U.S.
FILED
NOV 16 2007
OFFICE OF THE CLERK

No. 07-668

IN THE

Supreme Court of the United States

JASON DANIEL TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 16, 2007

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an escape conviction based on petitioner's failure to return to a halfway house is categorically a "violent felony" for purposes of 18 U.S.C. § 924(e).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Daniel Taylor respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-11a) is published at 489 F.3d 1112. The district court's Judgment of Conviction (Pet. App. 12a-21a) is unpublished. The order of the court of appeals denying rehearing en banc (Pet. App. 22a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. The order of the court of appeals denying rehearing en banc was entered on August 20, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Armed Career Criminal Act, 18 U.S.C. § 922(g), provides in relevant part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e) provides, in relevant part:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection –

* * *

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be

> punishable by imprisonment for such term if committed by an adult, that –
>
> * * *
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . .

U.S. Sentencing Guideline § 4B1.2 provides, in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT

1. Pursuant to 18 U.S.C. § 924(e), a defendant who violates 18 U.S.C. § 922(g) – which, inter alia, prohibits felons from possessing a gun – and who has three previous convictions for a "violent felony" and/or a serious drug offense is deemed an armed career

criminal and is subject to imprisonment for a minimum of fifteen years. As relevant here, Section 924(e) further defines the term "violent felony" as any crime punishable by imprisonment for more than one year that either has an element of physical force or "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B).

2. In May 1997, petitioner Jason Daniel Taylor signed out of the Orlando, Florida halfway house where he was incarcerated, but he failed to report back to the facility as scheduled. Pet. App. 4a n.3; Pet. C.A. Br. 4. He subsequently pled guilty in Florida state court to a charge of escape arising from his failure to return. Pet. App. 4a.

On January 9, 2006, petitioner pleaded guilty to one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). Pet. App. 1a; Pet. C.A. Br. 3. Based on petitioner's 1998 escape conviction and two prior burglary convictions, the government asked the district court to impose the mandatory fifteen-year minimum term required by Section 924(e). Pursuant to U.S.S.G. § 4B1.4(a) and (b)(3)(B), petitioner's Presentence Investigation Report (PSI) also reported an enhanced guideline sentencing range of 168 to 210 months, which was then increased to 180 to 210 months based on the statutory minimum. Pet. C.A. Br. 4-5.

At his initial sentencing hearing on April 13, 2006, petitioner objected to the classification of his state escape conviction as a "crime of violence" for purposes of U.S.S.G. § 4B1.2. The district court acknowledged the Eleventh Circuit's decision in

United States v. Gay, 251 F.3d 950 (2001), holding that an escape conviction based on the defendant's walk-away from non-secure custody qualified as a crime of violence for purposes of § 4B1.2. However, the court found a "substantial difference" between the facts of *Gay* and petitioner's case, and it questioned whether conduct such as petitioner's constituted the kind of violent conduct that Congress intended to include in Section 924(e):

> If I understand what we're dealing with here, what [petitioner] did was not a walk-away. He failed to come back. He left legally, he just didn't come back. . . . [I]t seems to me the only risk of violence that's presented in that conduct is that they have to go and arrest him. I understand, every time there is an arrest, there is a risk of violence. But, surely, Congress didn't mean every felony is a crime of violence, and every felony presents a risk of arrest.

See Pet. C.A. Br. 5-6. Despite these reservations, the district court nonetheless concluded that petitioner's prior escape conviction was a crime of violence:

> If I wrote on a clean slate, my ruling probably would be to the contrary. But the combination of the Eleventh Circuit decision in *Gay* and the overwhelming weight of authority from other circuits saying that even a failure to report type of escape is a crime of violence lead me to

> conclude that that is the law, and I thus must apply it.

See id. 8-9. Departing downward from the advisory sentencing guideline range of 180-210 months in light of a Section 5K1.1 motion, the district court sentenced petitioner to seventy-two months in prison. Pet. App. 13a.

On appeal, a panel of the Eleventh Circuit affirmed in a per curiam opinion. Explaining that its prior cases – such as *Gay* – interpreting the phrase "crime of violence" for purposes of § 4B1.2 "provide important guidance in determining what is a 'violent felony' under the ACCA 'because the definitions for both terms are virtually identical,'" Pet. App. 3a (citation omitted), the panel rejected petitioner's argument that his failure to return to a halfway house did not constitute a "violent felony" for purposes of Section 924(e). Although it acknowledged the Ninth Circuit's holding in *United States v. Piccolo*, 441 F.3d 1084, 1088 (2006), that escape from a halfway house is not categorically a crime of violence, the panel nonetheless reasoned that such a result was "foreclosed by [this] Court's mandate in *Taylor* [*v. United States*, 495 U.S. 575 (1990),] to apply a categorical approach to violent felony determinations and our subsequent conclusion in [*United States v. Gay*, 251 F.3d 950 (11th Cir. 2001),] that escape is categorically a violent felony." *Id.* 4a n.3.

Judge Hill wrote a separate opinion – joined by Judge Wilson – "concurring *dubitante*." Pet. App. 4a. He agreed that the panel was bound by the Eleventh Circuit's earlier decision in *Gay* but was "not

persuaded that it was correctly decided." *Id.* Instead, he joined the "growing . . . choruses of doubt," *id.* – including not only the Ninth Circuit in *Piccolo* but also Judge Posner in *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), and the concurring opinion of Judge McKay in *United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999), *cert. denied*, 529 U.S. 1030 (2000) – "that a district court is permitted to enhance a sentence under the ACCA based in part upon a 'failure to return' prior escape conviction." Pet. App. 4a-5a.

The court of appeals denied rehearing en banc on August 20, 2007. Pet. App. 22a. This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents the same question as three other petitions for certiorari currently pending before this Court: No. 06-10751, *Golden v. United States*; No. 06-11206, *Chambers v. United States*; and No. 07-61, *Mathias v. United States*. As those petitions make clear, the courts of appeals are divided on the question whether all escape convictions are categorically "violent felonies" or "crimes of violence." Moreover, the categorical rule adopted by the majority of circuits – including the Eleventh Circuit in this case – is wrong on the merits because it rests on the flawed assumption that all escapes, as well as the subsequent recapture of an escapee, pose a risk of serious violence. Certiorari is thus warranted to review the decision below. Alternatively, this Court should hold this petition pending its disposition of the petitions in *Golden*, *Chambers*, and *Mathias* and/or its opinion in *Begay v. United States*, *cert. granted*, No. 06-11543

(Sept. 25, 2007), in which this Court will consider whether a particular crime (in that case, driving while intoxicated) "involves conduct that presents a serious potential risk of physical injury to another."

I. The Courts of Appeals Are Divided Over Whether All Escapes Are Categorically "Violent Felonies" or Crimes of Violence."

1. As the petitions in *Golden*, *Chambers*, and *Mathias* make clear, the question whether all escapes are categorically "violent felonies" (for purposes of the Armed Career Criminal Act) or "crimes of violence" (for purposes of the career offender enhancement guideline, § 4B1.2) is the subject of an acknowledged circuit split.[1]

The decision below conflicts directly with the holdings of two courts of appeals, the Ninth and Sixth Circuits. In both of those circuits, petitioner's escape conviction would not count as a "violent felony" for purposes of the ACCA. In *United States v. Piccolo*, 441 F.3d 1084, 1085 (2006), the defendant was convicted under the federal escape statute, 18 U.S.C. § 751(a), after – like petitioner – he failed to return to a half-way house. Applying the categorical approach outlined by this Court in *Taylor v. United States*, 495 U.S. 575 (1990), the Ninth Circuit determined that because Section 751(a) did not include the use or attempted use of physical violence as an element of the

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[1] As the court of appeals explained, *see* Pet. App. 3a, the definitions of "violent felony" and "crime of violence" are "virtually identical," and the courts of appeals have treated them interchangeably, *see id.* 5a n.4 (Hill, J., concurring); Pet. for Cert. 6, *Mathias v. United States* (No. 07-61).

offense, the defendant's conviction would qualify as a "crime of violence" only if it involved "conduct that presents a serious potential risk of physical injury to another." Emphasizing that a failure-to-return escape such as Piccolo's was "of an entirely different order of magnitude than escapes from jails and prisons," the Ninth Circuit concluded that such escapes do not "categorically raise a serious potential risk of physical harm," and that Piccolo's conviction was thus not a "crime of violence." 441 F.3d at 1088.

In a case on all fours with petitioner's, the Sixth Circuit has similarly declined to adopt a categorical approach classifying all escapes as a "violent felony" or "crime of violence." In *United States v. Collier*, 493 F.3d 731 (2007), that court agreed with the defendant that his Michigan conviction for prison escape – which was based on the defendant's "simply stepping off a public Greyhound bus – where he was unaccompanied by any correctional officials – and failing to report to the facility to which he was being transferred," *id.* at 734-35 – did not qualify as a "violent felony" for purposes of the ACCA. Although it acknowledged the division among the circuits regarding "whether the distinction between a jailbreak and a 'walk away' is meaningful," the Sixth Circuit expressed "doubt that a statute covering this 'failure to report' variety of escape necessarily 'involves conduct that presents a serious potential risk of physical injury to another.'" 493 F.3d at 735. The court also rejected one of the premises underlying the categorical approach – viz., the concern that all attempts to re-capture an escaped convict, regardless how he escaped, carry a risk of serious violence. It explained that because Michigan law – like the Florida law at issue in this case, *see*

Gaskin v. State, 869 So. 2d 646, 647 (Fla. 3d DCA 2004) – defined the offense of "escape" as being complete when a defendant leaves custody without having been discharged, it would be "inappropriate to speculate about the circumstances of the defendant's ultimate apprehension because that conduct is simply not part of the offense." 493 F.3d at 736.[2]

By contrast, at least eight other circuits – like the Eleventh Circuit in this case – hold that escape is categorically a "violent felony" or "crime of violence" for purposes of the ACCA and the Sentencing Guidelines, respectively. *See Mathias* Pet. 17 nn.10-11 (citing cases).

2. As outlined in greater detail in the petitions for certiorari in *Chambers* (at 12-13) and *Mathias* (at 20), certiorari is warranted to review this important and recurring question of law. No further percolation of the issue is necessary, as virtually all of the circuits have already addressed the question presented in the context of either the ACCA or the Sentencing Guidelines. Moreover, only this Court's intervention can resolve the conflict of authority, as the courts of appeals employing the categorical approach have continued to adhere to their holdings notwithstanding the substantial and well-reasoned reservations expressed by judges such as Judge

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[2] *See also United States v. Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003) (expressing that court's "reluctan[ce] to adopt the categorical approach" but ultimately declining to decide whether all escapes constitute a "crime of violence" when defendant escaped from a police officer, a scenario in which "the risk of violence is much more apparent").

Posner, Judge Adkins, and Judges Hill and Wilson in this case. Finally, because petitioner's "escape" was complete under Florida law when he failed to return to his half-way house as scheduled, petitioner would prevail in both the Sixth and Ninth Circuits; his case is thus an ideal vehicle to consider the question presented.

II. The Eleventh Circuit's Categorical Rule Is Simply Flawed.

Certiorari is also warranted because the categorical rule, adopted by the Eleventh Circuit in this case, classifying all escapes as a "violent felony" or "crime of violence," rests largely on two premises, both of which are deeply flawed.

First, although courts adhering to the majority rule reason that "every escape scenario is a powder keg, which may or may not explode into violence," *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994), that assumption is (as Judge Posner has emphasized) pure "conjecture floating well free of any facts," *Chambers*, 473 F.3d at 727 – particularly as applied to defendants such as petitioner, who merely failed to return to his halfway house after an authorized departure.

Second, as the D.C. Circuit explained in *Thomas*, the assumption by the majority circuits that "even the most peaceful escape cannot eliminate the potential for violent conflict when the authorities attempt to recapture the escapee," 333 F.3d at 282 (quoting *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001)), "proves too much": under this reasoning, "the capture of any lawbreaker" would

"inherently contain[] a risk of violent encounter between the escapee and the arresting officers," such that essentially all crimes would qualify as "violent felonies" or "crimes of violence." *Id.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should either hold this petition pending its disposition of the petitions for certiorari in Nos. 06-10751, *Golden v. United States*, 06-11206, *Chambers v. United States*, and 07-61, *Mathias v. United States*, and/or hold the petition pending its decision in *Begay v. United States*, *cert. granted*, No. 06-11543 (Sept. 25, 2007).

Respectfully submitted,

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November 16, 2007

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 06-13139

D.C. Docket No. 05-00004-CR-4-RH-WCS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASON DANIEL TAYLOR,

Defendant-Appellant.

June 13, 2007, Decided

June 13, 2007, Filed

Before CARNES, WILSON and HILL, Circuit Judges. HILL, Circuit Judge, concurring.

PER CURIAM:

Jason Daniel Taylor pled guilty to one count of possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). The district court adjudged him to be an armed career criminal pursuant to 18 U.S.C. § 924(e)(1), because he had three prior convictions for violent felonies and sentenced him to 72 months' imprisonment, to be

followed by a five-year term of supervised release.[1] Taylor appeals this sentence. We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Gibson*, 434 F.3d 1234, 1243 (11th Cir. 2006).

I.

Under 18 U.S.C. § 924(e), the Armed Career Criminal Act (the "ACCA"), a person who violates § 922(g) and who has three previous convictions for a "violent felony," a serious drug offense, or both, is an armed career criminal and subject to imprisonment for a period of not less than fifteen years. Under the ACCA, the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year that has an element of physical force or "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). *See also United States v. Rainey*, 362 F.3d 733, 734 (11th Cir. 2004).

We have recognized that "[i]n determining whether a particular offense falls within this definition, the Supreme Court has directed trial courts to pursue a categorical approach, 'looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (quoting *Taylor v. United States*, 495 U.S. 575, 600 (1990)). *See also James v. United States*, 127 S. Ct. 1586, 1594 (2007) (we "do

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[1] Taylor's advisory sentencing guideline range as an armed career criminal was 168-210 months. The district court departed downward based upon the government's Section 5K1.1 motion.

not generally consider the 'particular facts disclosed by the record of conviction'") (internal citations omitted). We may look beyond the "fact of conviction and the statutory definition of the prior offense" to the "particular facts underlying those convictions" only in "a narrow range of cases" where it is impossible to determine from the face of the judgment or the violated statute whether the prior conviction was for a violent felony. *Taylor*, 495 U.S. at 600, 602. *See also Shepard v. United States*, 544 U.S. 13, 17 (2005).

We have previously held that escape is a crime of violence for the purpose of determining career offender status under § 4B1.2 of the Sentencing Guidelines. *United States v. Gay*, 251 F.3d 950, 952 (11th Cir. 2001). We have also held that our cases interpreting "crime of violence" under § 4B1.2 provide important guidance in determining what is a "violent felony" under the ACCA "because the definitions for both terms are virtually identical." *Rainey*, 362 F.3d at 735. Therefore, we hold that, just as under the Guidelines, escape is a violent felony for purposes of determining armed career criminal status under the ACCA.[2]

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[2] We note that this interpretation of § 924(e) is consistent with most of our sister circuits. *See United States v. Childs*, 403 F.3d 970, 971 (8th Cir. 2005); *United States v. Moore*, 401 F.3d 1220, 1226 (10th Cir. 2005); *United States v. Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003); *United States v. Franklin*, 302 F.3d 722, 723-25 (7th Cir. 2002); *United States v. Jackson*, 301 F.3d 59, 61-63 (2d Cir. 2002); *United States v. Houston*, 187 F.3d 593, 594-95 (6th Cir. 1999). *But see United States v. Piccolo*, 441 F.3d 1084, 1088 (9th Cir. 2006) (escape from halfway house not categorically a crime of violence under Guidelines).

II.

Taylor pled guilty to escape in a Florida court. There is no ambiguity in the fact of his conviction for escape. Therefore, the district court was bound by *Taylor* and *Wilkerson* to apply our rule that escape is a violent felony as contemplated by the ACCA categorically to Taylor's prior escape conviction.[3] In so doing, the district court correctly found that Taylor had three prior convictions for a violent felony and adjudicated him to be an armed career criminal under § 924(e)(1) of the ACCA. Accordingly, the district court's sentence is without legal error and is due to be

AFFIRMED.

HILL, Circuit Judge, concurring *dubitante*, in which WILSON, Circuit Judge, joins:

Although I concur under the authority of *Gay*, I am not persuaded that it was correctly decided. I wish to join a tiny, but growing, choruses of doubt that a district court is permitted to enhance a

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[3]Taylor's argument that we should undertake to distinguish between his non-violent "failure to return" to a halfway house and other types of escapes is foreclosed by the Supreme Court's mandate in *Taylor* to apply a categorical approach to violent felony determinations and our subsequent conclusion in *Gay* that escape is categorically a violent felony. *Gay*, 251 F.3d at 955 (offense of escape a crime of violence even when it involves a "walk-away" from unsecured correctional facilities); *see also United States v. Jackson*, 301 F.3d 59 (2d Cir. 2002) (under the categorical approach, regardless of the underlying facts, a conviction under Florida escape statute *always* a violent felony under § 924(e)).

sentence under the ACCA based in part upon a "failure to return" prior escape conviction.

Under § 924(e)(1), the district court is entitled to count as a "violent felony" for enhancement purposes a prior conviction for "conduct that presents a serious potential risk of physical injury to another." In 1994, the Tenth Circuit held that escape is categorically such a violent felony because "every escape scenario is a powder keg," *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). Since then, every other court of appeals, save the D.C. and the Ninth Circuits, has adopted this rule.[4]

Although *Gosling* involved a prior conviction based upon an unauthorized departure from actual custody, some circuits have since specifically approved enhancements based upon escape convictions for "failure to return" to a halfway house after work-release. *United States v. Mathias*, 482 F.3d 743, 746 (4th Cir. 2007); *United States v. Rivera*, 127 Fed. Appx. 543, 545 (2d Cir. 2005) (same); *United States v. Winn*, 364 F.3d 7, 11 (1st Cir. 2004) (failure to return to halfway house after break); *United States v. Bryant*, 310 F.3d 550, 554 (7th Cir. 2002) (failure to return after work-release).

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[4]The Ninth Circuit refused to permit the enhancement, holding that a peaceful failure to return accompanied by the defendant's voluntary surrender four days later, is not a crime of violence under the Sentencing Guidelines. *United States v. Piccolo*, 441 F.3d 1084, 1089-90 (9th Cir. 2006). The D.C. Circuit reserved the same issue in *United States v. Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003). As the panel opinion observes, the courts uniformly treat "crimes of violence" under the Guidelines and "violent felonies" under the ACCA the same.

In support of this holding, these courts have agreed with *Gosling's* speculation that:

> A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. . . . [E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious risk that injury will result when officers find the defendant and attempt to place him in custody.

39 F.3d at 1142.

But, even as the circuits clambered aboard the "escape as a violent felony" bandwagon, there were a few skeptics. Five years after its decision in *Gosling*, the Tenth Circuit, observing that it was bound by circuit precedent, affirmed an enhancement for a non-violent escape. In a special concurrence, however, Judge McKay took pains to distance himself from the panel's assumption that *Gosling* established that escape was categorically a crime of violence. *United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999) (McKay, J., concurring). Judge McKay asserted that it is wrong to assume that escape always constitutes "conduct that presents such a serious potential risk of physical injury to another," as required by the ACCA. Specifically pointing to state statutes that make failure to return from work-release or other inmate release programs a felony escape, he wrote "[t]here is a quantum

difference between the assumptions about the intrinsic danger of unauthorized departure from actual custody, as in this case, and of failure to return from authorized departure from actual custody." *Id.* To interpret the ACCA to permit enhancement based upon the latter type of escape, he concluded, would be an "abuse of language and a departure from the text of the statute." *Id.*

In 2003, the D.C. Circuit specifically reserved the question of whether escape is categorically a crime of violence. *United States v. Thomas*, 333 F.3d 280, 282 (D.C. Cir. 2003). The court observed that the argument that recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers "proves too much." The court noted that "the same is true as to the capture of any lawbreaker," and that under this approach "all crimes become crimes of violence." *Id.* The court declined to adopt such a rule.

In 2004, the First Circuit in *Winn* noted the reservations of both the D.C. Circuit and Judge McKay, quoting them both. Nonetheless, the court acknowledged that "the formal categorical approach is the well-established method in this Circuit for determining what constitutes a crime of violence," and concluded that this approach "forecloses the conclusion" that a failure to return escape may be treated differently from a jail breakout. *Winn*, 364 F.3d at 12.

In 2006, however, the Ninth Circuit, in a failure to return case, refused to hold that escape is categorically a crime of violence. *United States v. Piccolo*, 441 F.3d 1084, 1088 (9th Cir. 2006). The

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court reasoned that "[w]hile an escapee who flees a secured facility or the custody of an armed guard presents a serious risk of injury to himself and others, the same cannot be said for an escapee who leaves a halfway house with permission and fails to return." *Id.* at 1089. Echoing Judge McKay, the court concluded that the "circumstances apparent in a walkaway escape are of an entirely different order of magnitude than escapes from jails and prisons." Because of these differences, the court concluded that "convictions under [the federal escape statute] sweep too broadly to qualify as a crime of violence." *Id.* at 1088, 1090.[5]

Finally, in *United States v. Chambers*, 473 F.3d 724 (7th Cir. 2007), reviewing an enhancement based upon a "failure to report to prison" escape conviction, Judge Posner wrote:

> As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often "involves conduct that presents a serious potential risk of physical injury to another." You could show up an hour late (without an excuse) and be guilty of

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[5] The court also noted that the Sentencing Guidelines specifically call for a four-level reduction in the sentence for conviction of escape from non-secure facilities, finding this fact "irreconcilable" with the position that the same escape can later trigger a fifteen-year mandatory minimum sentence. *Piccolo*, 441 F.3d at 1088.

> a felony that could result in your receiving a 15-year mandatory minimum sentence under the Armed Career Criminal Act.

Id. at 725 (internal citation omitted).

Recognizing that his circuit, like the vast majority, is bound by the categorical approach to escape, Judge Posner held that "we shall adhere to the precedents *for now*." *Id.* at 726 (emphasis supplied). He added:

> But it is an embarrassment to the law when judges base decisions of consequence on conjecture, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.

Id.

He further noted that the speculation in *Gosling* about the possibility of violence during recapture of an escapee is "conjecture floating well free of any facts – even the facts of *Gosling*." *Id.* at 727.[6] He wrote:

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[6] My conjecture is that prisoners who fail to return to halfway houses are inviting re-arrest in order to avoid the imminent release implied by the halfway house stage of incarceration. Such prisoners seek the security of incarceration. I speculate that they are among the *least* likely escapees to resist rearrest. In the absence of proof otherwise, I doubt that my speculation is any less reliable than that of the *Gosling* court.

> The opinion says nothing about the nature of Gosling's escape, but the reference to escaping from a jail suggests that the court wasn't thinking about walkaway escapes, or failure to return or report, but about jail breaks . . . . Its ruminations should not be treated as authoritative in a case that does not involve a jail break.

Id.

Judge Posner suggests that both the Sentencing Commission and the Congress should address this problem.[7] In the interim, I wish to express my agreement with those who reject the rule that escape is categorically a violent felony.[8]

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[7] "The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failure to report or return. Should it turn out that the latter frequency is very low, this would provide a powerful reason to reexamine *Bryant* and *Golden*. Alternatively, Congress, which has investigative tools, might examine the issue with a view toward a possible clarification of 18 U.S.C. § 924(e)(1)." *Chambers*, 473 F.3d at 724. Recently, in *James*, the Supreme Court cited *Chambers* in its discussion of the relevance of empirical analysis in the determination of whether an unenumerated crime poses a serious risk of violence. 127 S. Ct. at 1596.

[8] Like the Florida statute at issue in this case, many state statutes define a failure to return to a halfway house as "escape." *See* Fla. Stat. § 945.091(4). Thus, a conviction for or plea of guilty to such a statute – even for a failure to return – counts as a violent felony. In *Taylor*, however, the Supreme

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Court reaffirmed that ordinarily federal law is not to be construed so that its application is dependent upon state law. 495 U.S. at 590. Applying that principle to the meaning of burglary as used in the ACCA, the Court rejected Missouri's definition of burglary in favor of a "generic" meaning and remanded the case to the trial court to determine if the defendant's conviction for burglary in that case corresponded to such a generic definition. *Id.* at 602. This, it seems to me, presents a sensible solution to the problem of categorizing escape as a violent felony. Adoption by the federal courts of a generic federal definition of escape that would include unauthorized departures from actual custody, but exclude a failure to return after an authorized departure from a non-secure facility would further the intent of the statute to enhance the sentences of defendants with prior convictions for crimes with a "serious potential for violence," without permitting that intent to be trumped by "technical definitions and labels under state law." *Taylor*, 495 U.S. at 590.

Judge Posner makes a similar suggestion in *Chambers*: "There would be no impropriety in dividing escapes, for purposes of "crime of violence" classification, into jail or prison breaks on the one hand and walkaways, failure to report, and failure to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard v. United States*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in." 473 F.3d at 726.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case # 4:05cr4-01(S)

UNITED STATES OF AMERICA

v.

JASON DANIEL TAYLOR

Defendant's Attorney: William Clark (AFPD), 227 N. Bronough Street, Suite 4200, Tallahassee, Florida 32301

JUDGMENT IN A CRIMINAL CASE

The defendant pled guilty to Count 1 of the Superseding Indictment on January 9, 2006. Accordingly, **IT IS ORDERED** that the defendant is adjudged guilty of such count which involves the following offense:

TITLE/SECTION NUMBER: 18 U.S.C. §§ 922 (g) and 924(e)

NATURE OF OFFENSE: Possession of a Firearm by a Convicted Felon

DATE OFFENSE CONCLUDED: July 24, 2004

COUNT: 1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, including amendments effective subsequent to 1984, and the Sentencing Guidelines promulgated by the U.S. Sentencing Commission.

Count 2 is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:

May 25, 2006

s/Robert L. Hinkle

Chief United States District Judge

May 26, 2006

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **72 months**.

The Court recommends to the Bureau of Prisons **in order of priority:**

1. That defendant receive a medical evaluation and any necessary treatment (see ¶61 of PSR and attached medical evaluation), with no break in appropriate medication, while in the custody of the Bureau of Prisons.

2. That defendant participate in a Residential Drug Abuse Program while in the custody of the Bureau of Prisons.

3. That Defendant be designated to a facility as near as possible to Tavares, Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **5 years.**

The defendant shall report to the probation office in the district to which the defendant is

released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime and shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the following standard conditions that have been adopted by the court.

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;

2. the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4. the defendant shall support his or her dependants and meet other family responsibilities;

5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. the defendant shall notify the probation officer at least 10 days prior to any change in residence or employment;

7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. the defendant shall not associate with any persons engaged in criminal activity and shall not associated with any person convicted of a felony unless granted permission to do so by the probation officer;

10. the defendant shall permit a probation officer to visit him or her at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11. the defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. if this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not own or possess a firearm, dangerous weapon, or destructive device.

3. The defendant shall submit to testing to determine whether he is using drugs or alcohol.

4. The defendant shall participate in a program of substance abuse treatment.

5. The defendant shall participate in a program of mental health treatment.

6. The defendant shall provide the probation officer all requested financial information, business or personal.

7. The defendant shall cooperate with the probation department in the collection of DNA samples as required by 42 U.S.C. §14135a.

8. The defendant shall cooperate with the probation department and/or the appropriate state agency in the establishment and enforcement of child support payments and shall make all required child support payments.

Upon finding a violation of probation or supervised release, I understand the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

_____ _____

Defendant Date

_____ _____

U.S. Probation Officer/ Date

Designated Witness

CRIMINAL MONETARY PENALTIES

All criminal monetary penalty payments, except those payments made through the Bureau of

Prisons' Inmate Financial Responsibility Program, are to be made to the Clerk, U.S. District Court, unless otherwise directed by the Court. Payments shall be made payable to the Clerk, U.S. District Court, and mailed to 111 N. Adams St., Suite 322, Tallahassee, FL 32301-7717. Payments can be made in the form of cash if paid in person.

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(g).

SUMMARY

Special Monetary Assessment	Fine	Restitution
$100.00	-0-	-0-

SPECIAL MONETARY ASSESSMENT

A special monetary assessment of $100.00 is imposed.

No fine imposed.

No restitution imposed.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) special monetary assessment; (2) non-

federal victim restitution; (3) federal victim restitution; (4) fine principal; (5) costs; (6) interest; (7) penalties

Payment of the total fine and other criminal monetary penalties shall be due as follows:

in full immediately

The defendant must notify the court of any material changes in the defendant's economic circumstances, in accordance with 18, U.S.C. §§ 3572(d), 3664(k) and 3664(n). Upon notice of a change in the defendant's economic condition, the Court may adjust the installment payment schedule as the interests of justice require.

Special instructions regarding the payment of criminal monetary penalties pursuant to 18 U.S.C. § 3664(f)(3)(A):

Unless the court has expressly ordered otherwise above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. In the event the entire amount of monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due. The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

The defendant shall forfeit the defendant's interest in the following property to the United States:

Rossi .22 caliber rifle

Certificate of Service

I CERTIFY that a copy of the foregoing has been furnished by United States Mail to Assistant United States Attorney Terry Flynn, 111 North Adams Street, 4th Floor, Tallahassee, FL 32301; and Mr. Jason Taylor, Reg. No. 11971-017, FDC Tallahassee, 501 Capital Circle N.E., Tallahassee, FL 32301, this 14th day of September, 2006.

s/Gwendolyn Spivey

Assistant Federal Public Defender

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 06-13139

United States of America,

Plaintiff-Appellee,

Versus

Jason Daniel Taylor,

Defendant-Appellant

On Appeal from the United States District Court for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: CARNES, WILSON and HILL, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition for Rehearing En Banc are DENIED

ENTERED FOR THE COURT:

s/ James Hill

United State Circuit Judge

August 20, 2007

No. 07-668

In the Supreme Court of the United States

JASON DANIEL TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
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KEVIN R. GINGRAS
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QUESTION PRESENTED

Whether petitioner's prior conviction for escape constituted a violent felony under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e).

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In the Supreme Court of the United States

No. 07-668

JASON DANIEL TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 489 F.3d 1112.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2007. A petition for rehearing was denied on August 20, 2007. Pet. App. 22a. The petition for a writ of certiorari was filed on November 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Florida, petitioner was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). The district court sentenced petitioner to 72 months of imprisonment, to be

followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-13a.

1. The Armed Career Criminal Act (ACCA) imposes a mandatory minimum term of 15 years of imprisonment for any person convicted of possession of a firearm by a felon if that person had "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1) (2000 & Supp. V 2005). The ACCA defines a "violent felony," in relevant part, as any crime "punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii).

2. On July 24, 2004, petitioner, who had six prior felony convictions, sold a rifle to a pawn shop in Tallahassee, Florida. After the Bureau of Alcohol, Tobacco, and Firearms investigated the sale, petitioner was charged with one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g). Petitioner later pleaded guilty to the count. Presentencing Report paras. 7-13 (PSR); Gov't C.A. Br. 2-3.

The probation officer recommended in the PSR that petitioner be sentenced under the ACCA's 15-year minimum sentence because he had previously been convicted of three violent felonies (two burglaries and one escape). PSR paras. 22, 70. At sentencing, petitioner argued that his escape conviction was not a violent felony.[1] The district court overruled petitioner's objection and held that he was an armed career criminal. After determining

[1] The escape conviction was for violation of a Florida state law which prohibits any "prisoner confined in any prison, jail, road camp, or other penal institution," from "escap[ing] or attempt[ing] to escape from such confinement[.]" Fla. Stat. Ann. § 944.40 (1998).

that petitioner's advisory Sentencing Guidelines range was 180-210 months of imprisonment, the court imposed a sentence of 72 months of imprisonment—below the Guidelines range and the statutory minimum—based on the government's motion, pursuant to Sentencing Guidelines § 5K1.1, for a reduction in petitioner's sentence because of substantial assistance. See 5/25/06 Sent. Tr. 13-14; Gov't C.A. Br. 2;

3. The court of appeals affirmed. Pet. App. 1a-11a. The court followed its ruling in *United States* v. *Gay*, 251 F.3d 950 (11th Cir. 2001), which held that the Georgia offense of escape is a violent felony for the purposes of determining armed career criminal status under the Sentencing Guidelines. Pet. App. 2a-3a.

The court of appeals rejected petitioner's invitation to distinguish between his "non-violent 'failure to return' to a halfway house and other types of escapes," Pet. App. 4a n.3, explaining that such a distinction was foreclosed by its decision in *Gay*, as well as this Court's mandate in *Taylor* v. *United States*, 495 U.S. 575 (1990), that courts apply a categorical approach to violent felony determinations. Pet. App. 4a n.3. The court also noted that the Second Circuit had previously determined in *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002), that a conviction under the same Florida escape statute was always a violent felony under Section 924(e). Pet. App. 4a n.3

Judge Hill wrote a separate concurring opinion, which Judge Wilson joined. Pet. App. 4a-11a. While Judge Hill agreed that the court of appeals' decision in *Gay* compelled the decision in this case, he "wish[ed] to join a tiny, but growing, chorus[] of doubt that a district court is permitted to enhance a sentence under the ACCA based in part upon a 'failure to return' prior es-

cape conviction," *id.* at 4a-5a, and to "express [his] agreement with those who reject the rule that escape is categorically a violent felony," *id.* at 10a.

ARGUMENT

Petitioner argues (Pet. 7-12) that escape accomplished by a failure to return to confinement is not a violent felony under the ACCA. That argument lacks merit and does not warrant this Court's review.

1. A prior conviction for a "crime punishable by imprisonment for a term exceeding one year" qualifies as a "violent felony" under the ACCA if the offense "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). Section 924(e) generally requires a "categorical approach" to determining whether or not a prior offense constitutes a "violent felony" within the meaning of Section 924(e)(2)(B). *Taylor* v. *United States*, 495 U.S. 575, 600-602 (1990). Under the categorical approach, sentencing courts must "look[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying th[e] convictions." *Id.* at 600.

The categorical approach does not, however, "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony." *James* v. *United States*, 127 S. Ct. 1586, 1597 (2007). "Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Ibid.*

The crime of escape is a violent felony because, in the ordinary case, it poses a serious potential risk of physical injury. As the Tenth Circuit has explained:

> [E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so. A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

United States v. *Moudy*, 132 F.3d 618, 620, cert. denied, 523 U.S. 1036 (1998) (quoting *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)).

Petitioner errs in asserting (Pet. 11-12) that a failure-to-report offense, unlike an escape accompanied by violence, creates no risk of injury in the ordinary case. As an initial matter, the Florida offense at issue here is not limited to failures to return to custody. Instead, it applies whenever "[a]ny prisoner confined in any prison, jail, road camp, or other penal institution, state, county, or municipal, working upon the public roads, or being transported to or from a place of confinement * * * escapes or attempts to escape from such confinement[.]" Fla. Stat. Ann. § 944.40 (1998). Under the categorical approach any argument about the nature of the particular escape at issue here—*i.e.*, that petitioner failed to return as opposed to escaping directly from a jail through the use of force—is not persuasive. See Pet. App. 4a & n.3 (rejecting petitioner's argument that the

court should "distinguish between his non-violent 'failure to return' to a halfway house and other types of escapes").

In any event, an escape accomplished by a failure to return to custody presents a "powder keg" situation because the subsequent recapture of an escapee gives rise to a serious potential risk of physical injury, even if that risk does not ripen into actual violence. *Gosling*, 39 F.3d at 1142. "Even though initial circumstances of an escape may be non-violent, there is no way to predict what an escapee will do when encountered by authorities." *United States* v. *Turner*, 285 F.3d 909, 916 (10th Cir.), cert. denied, 537 U.S. 895 (2002). While petitioner contends (Pet. 11-12) that apprehension of any "lawbreaker" presents some risk of injury, that risk is heightened for escapees. "Individuals who find custody intolerable to the point of escape are unlikely to calmly succumb to recapture efforts." *United States* v. *Mathias*, 482 F.3d 743, 748 (4th Cir. 2007), petition for cert. pending, No. 07-61 (filed July 12, 2007); see *United States* v. *Jackson*, 301 F.3d 59, 63 (2d Cir. 2002) ("[E]scape invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public."), cert. denied, 539 U.S. 952 (2003).

2. Petitioner greatly overstates (Pet. 8-10) the extent to which courts of appeals are divided over the question whether a felony escape conviction constitutes a violent felony under the ACCA or a crime of violence under the Sentencing Guidelines. In fact, every circuit to have confronted the specific question presented here, whether a felony escape offense categorically constitutes a violent felony under the ACCA, has answered in the affirmative. See, *e.g.*, *United States* v. *Lancaster*, 501

F.3d 673, 679-681 (6th Cir. 2007), petition for cert. pending, No. 07-7987 (filed Nov. 29, 2007); *United States* v. *Maddox*, 388 F.3d 1356, 1368-1369 (10th Cir. 2004) (failure to return from work-release program), cert. denied, 544 U.S. 935 (2005); *United States* v. *Adams*, 442 F.3d 645, 647 (8th Cir. 2006) ("walkaway" escape), cert. denied, 127 S. Ct. 2095 (2007); *United States* v. *Golden*, 466 F.3d 612 (7th Cir. 2006) (failure to report to county jail), petition for cert. pending, No. 06-10751 (filed Apr. 9, 2007); *Mathias*, 482 F.3d at 748 ("walkaway" from work release program).

a. Petitioner is mistaken in contending (Pet. 9-10) that the conflict between this case and the Sixth Circuit's decision in *United States* v. *Collier*, 493 F.3d 731 (6th Cir. 2007), warrants this Court's review. In *Collier*, the Sixth Circuit drew a narrow exception to its general rule that a felony escape conviction is a violent felony under the ACCA for state escape offenses that a State deems not a continuing offense, but instead complete upon the defendant's departure from custody. *Id.* at 735; see *Lancaster*, 501 F.3d at 679-680 (stressing that escape is generally viewed as a continuing offense, and that only six states "arguably" take a contrary view). *Id.* at 680. Because the Florida escape statute, like the Michigan statute at issue in *Collier*, defines the offense of escape as complete when a defendant leaves custody without having been discharged, the Eleventh Circuit's opinion in this case conflicts with the decision in *Collier*. This case would be a particularly poor vehicle to address that question, however, because petitioner did not raise the issue in the district court or on direct appeal. Accordingly, reversal would be appropriate only if petitioner could show plain error, which he cannot. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Be-

cause the courts of appeals have overwhelmingly concluded that felony escape convictions categorically constitute violent felonies within the ambit of § 924(e), any error could not be "clear" or "obvious." *Ibid.*

b. Contrary to petitioner's contention (Pet. 8), the court of appeals' decision does not conflict with the Ninth Circuit's decision in *United States* v. *Piccolo*, 441 F.3d 1084 (2006), which concluded that a walkaway escape from a halfway house was not a "crime of violence" under Sentencing Guidelines § 4B1.2(a)(2).[2] *Piccolo*, 441 F.3d at 1088. Significantly, *Piccolo* interpreted the Sentencing Guidelines, not the ACCA. Because the Sentencing Commission is charged by Congress with "periodically review[ing] the work of the courts" in applying the (now-advisory) Guidelines and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," *Braxton* v. *United States*, 500 U.S. 344, 348 (1991), the Ninth Circuit's Guidelines decision in *Piccolo* does not warrant review of the statutory question presented in this case. See *Rita* v. *United States*, 127 S. Ct. 2456, 2464 (2007) ("The Commission's work is ongoing" and includes responding to court decisions.); *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will con-

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[2] Additionally, this case does not conflict with any decision from the D.C. Circuit. The language petitioner cites (Pet. 11-12) from the D.C. Circuit's decision in *United States* v. *Thomas*, 333 F.3d 280, 282 (2003), was merely dicta. See *id.* at 283 (reserving the question whether a walkaway escape would qualify as a crime of violence under Guidelines § 4B1.2). That court later held, albeit in a decision vacated on other grounds, that such escapes are violent felonies. *United States* v. *Thomas*, 361 F.3d 653, 658 (D.C. Cir. 2004), vacated on other grounds, 543 U.S. 1111 (2005).

tinue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."); see also *Kimbrough* v. *United States*, 128 S.Ct. 558, 574 (2007) ("While [*Booker*] render[ed] the Sentencing Guidelines advisory * * * "we have nevertheless preserved a key role for the Sentencing Commission."). Although some of *Piccolo*'s reasoning may suggest that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of the ACCA, to date the Ninth Circuit has not reached that question.

3. This Court has recently denied petitions for writs of certiorari presenting virtually the same question as the petition in this case. See, *e.g.*, *Brooks* v. *United States*, 127 S. Ct. 3003 (2007) (No. 06-9681); *Flowers* v. *United States*, 127 S. Ct. 2935 (2007) (No. 06-9320); *Adams* v. *United States*, 127 S. Ct. 2095 (2007) (No. 06-6541); *Ballard* v. *United States*, 127 S. Ct. 2094 (2007) (No. 06-5729). The Court should deny this petition as well.

Alternatively, the Court may wish to hold the petition pending its decision in *Begay* v. *United States*, cert. granted, No. 06-11543 (Sept. 25, 2007), which presents the question whether driving while intoxicated is a "violent felony" under the ACCA. While this case and *Begay* involve different crimes, they both involve the question whether a particular crime "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(B)(ii). To the extent that this Court has decided to hold petitions claiming that escape is a violent felony, *e.g.*, *Mathias* v. *United States*, petition for cert. pending, No. 07-61 (filed July 12, 2007), the Court should accord similar treatment to this peti-

tion by holding it for *Begay* and then disposing of it as appropriate in light of the decision in that case.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's disposition of *Begay* v. *United States*, No. 06-11543, and then disposed of as appropriate in light of this Court's decision in that case.

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JANUARY 2008

FILED
FEB 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-668

IN THE

Supreme Court of the United States

JASON DANIEL TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

1. Although the government contends that "every circuit to have confronted the specific question presented here, whether a felony escape offense categorically constitutes a violent felony under the ACCA, has answered in the affirmative," BIO 6, it acknowledges that the Eleventh Circuit's decision in this case conflicts with the Sixth Circuit's decision in *United States v. Collier*, 493 F.3d 731 (6th Cir. 2007). It maintains only that petitioner's case "would be a particularly poor vehicle to address [the question presented] . . . because petitioner did not raise the issue in the district court or on direct appeal." BIO 7. That assertion is incorrect. The briefs and memoranda filed by both petitioner and the government make clear that the issue whether a failure-to-return escape is a "violent felony" for purposes of the ACCA was raised both in the district court and in the Eleventh Circuit. In the district court, for example, the sentencing memorandum submitted by petitioner noted that petitioner's Florida escape conviction "is thought to be the third 'crime of violence' for [petitioner's] classification as a 'armed career criminal,'" Def's Sent. Mem. 1 (Apr. 28, 2006), and asked the district court to "determine that he is not an Armed Career Criminal for sentencing purposes," *id.* at 3. The government's sentencing memorandum repeatedly reflected its understanding that the application of the ACCA is at issue: it argued, for example, that "cases interpreting 'crime of violence' pursuant to U.S.S.G. § 4B1.2 provide helpful guidance *in a case such as this* involving the interpretation of 'violent felony' pursuant to 18 U.S.C. § 924(e)," U.S. Sent. Mem. 3 (emphasis added), and

asked the district court to "find that [petitioner's] conviction for escape constitutes a violent felony for purposes of 18 U.S.C. § 924(e)," *id.* at 7; *see also id.* at 2 ("Other than an exception which applies regarding prior burglary convictions and which is not relevant here, '[i]n determining whether a particular offense falls within this definition [§ 924(e)(2)(B)'s definition of "violent felony"] the Supreme Court has directed trial courts to pursue a categorical approach . . . ."); *id.* at 7 ("[T]his Court should rule that defendant's prior escape conviction constituted a 'violent felony' pursuant to 18 U.S.C. § 924(e).").

The transcripts from the district court similarly reflect the understanding of both the district court and the government that the ACCA issue was properly before the court. In petitioner's initial sentencing hearing, the district court commented that "[t]he reason Congress adopted these provisions is to recognize that defendants who have engaged in violent conduct deserve to be treated differently in certain respects. Particularly, for example, in the 924(e) setting, it's someone who possesses a gun." R56-9-11, *reprinted in* Petr. C.A. Br. 6. Later, it added that "[s]omebody who has walked away from a work release and failed to turn themselves in, or somebody who has been sentenced and failed to turn themselves in is guilty of a felony and ought not to have a gun, but that situation probably doesn't present the same risk that Congress is dealing with in 924(e)." *Id.*, *reprinted in* Petr. C.A. Br. 6-7. And in the subsequent sentencing hearing, the government began its argument by outlining its "position . . . that analysis of what type of crime constitutes a crime of violence under section 924(e)

requires a categorical approach." Sent. Hrg. Trans. 2-3 (May 25, 2006).

Petitioner's submissions in the Eleventh Circuit, as well as the government's brief below, confirm that the issue was also raised in that court. Petitioner's opening brief below (at 6-7) quoted extensively from the district court's discussion of Section 924(e) and expressly urged the court (at 26) to hold "that prior Escape convictions which were based on a failure to return . . . do not qualify as a "crime of violence" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or U.S.S.G. § 4B1.2." And although the government argues in this Court for the first time (at 7-8) that the plain error rule applies, the government's brief below similarly made clear that both sides and the district court regarded the case as presenting the ACCA question: it stated the issue as "whether *United States v. Gay* should be limited to exclude a prior escape conviction based upon a failure to return to a halfway house from being a predicate offense for Armed Career Criminal Act purposes," U.S. C.A. Br. 1; contended that "[t]he district court did not err when it found that Defendant's escape involving his failure to return to a work release center is likewise a violent crime predicate under the Armed Career Criminal Act," *id.* at 5; and described petitioner's brief as arguing "that his conviction for escape should not be a predicate crime of violence under Title 18, United States Code, Section 924(e), the Armed Career Criminal Act," *id.* at 6.

The United States's further contention (BIO 8) that the decision below "does not conflict with the Ninth Circuit's decision in *United States v. Piccolo*,"

441 F.3d 1084 (2006), because that case dealt with the Sentencing Guidelines rather than the ACCA, is also unavailing. Although the government concedes that "some of *Piccolo*'s reasoning may suggest that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of the ACCA," it emphasizes that "to date the Ninth Circuit has not reached that question." *Id.* at 9. To be sure, the government is correct that the Ninth Circuit has not addressed the specific question presented by the petition, but the government offers no reason to believe that the Ninth Circuit would reach a different holding in cases involving the ACCA: as even the Eleventh Circuit acknowledged in this case, the definitions of "crime of violence" and "violent felony" are virtually identical, *see* Pet. App. 3a, and the courts of appeals have treated them interchangeably, including the Ninth Circuit in *Piccolo*, *see* 441 F.3d at 1089 (listing cases relying on *Taylor v. United States*, 495 U.S. 575 (1990), to hold "that any escape, however effected, categorically constitutes a crime of violence under the Sentencing Guidelines" and then noting that "[c]ourts have similarly applied *Taylor* in analogous circumstances to rule that an escape conviction qualifies as a 'violent felony' under the Armed Career Criminal Act"). *See also* Pet. App. 5a n.4 (Hill, J., concurring *dubitante*) (noting that, "[a]s the panel opinion observes, the courts uniformly treat 'crimes of violence' under the Guidelines and 'violent felonies' under the ACCA the same"). Indeed, in this case the government itself has argued that the reasoning underlying the categorical treatment of escapes as "crimes of violence" for purposes of the Sentencing Guidelines should apply fully to ACCA cases. *See* U.S. Sent. Mem. 3 (explaining that "cases

interpreting 'crime of violence' pursuant to U.S.S.G. § 4B1.2 provide helpful guidance in a case such as this involving the interpretation of 'violent felony' pursuant to 18 U.S.C. § 924(e) 'because the definitions for both terms are virtually identical'"); *see also* U.S. C.A. Br. 10 (arguing without additional analysis that Eleventh Circuit's decision in *Gay*, addressing "career offender" status under Sentencing Guidelines, "should be extended to categorize escape based upon a failure to return as a violent felony for ACCA purposes").

2. The government's contention that a failure-to-return escape is categorically a violent felony for purposes of the ACCA lacks merit. First, as Judge Posner noted in *United States v. Chambers*, 473 F.3d 724, 727 (7th Cir. 2007), *petition for cert. pending*, No. 06-11206 (filed May 8, 2006), almost ninety percent of all escapes from U.S. prisons are walkaways. Thus (and again as Judge Posner explained in *Chambers*), "if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence." *Id.*; *see also* BIO 4 ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." (quoting *James v. United States*, 127 S. Ct. 1586, 1597 (2007)). Second, the government's fall-back argument – that the recapture of a prisoner (such as petitioner) who escaped by leaving a work-release program with authorization but then failed to return to custody "gives rise to a serious potential risk of physical injury, even if that risk does not ripen into actual

violence," is pure "conjecture floating well free of any facts." *Chambers*, 473 F.3d at 727.

3. The government's final argument – viz., that certiorari should be denied because this Court has denied other petitions presenting the same question – also falls short. As the petition explained (at 10-11), and the government does not dispute, this case presents an important and recurring question of law: petitioner is aware of at least six other petitions for certiorari that have been filed in the seven months since this Court denied certiorari in *Brooks v. United States*, 127 S. Ct. 3003 (2007) (No. 06-9681). *See Golden v. United States*, *petition for cert. pending*, No. 06-10751 (filed Apr. 9, 2007), *Chambers v. United States*, *petition for cert. pending*, No. 06-11206 (filed May 8. 2006), *Mathias v. United States*, *petition for cert. pending*, No. 07-61 (filed July 12, 2007), *Lancaster v. United States*, *petition for cert. pending*, No. 07-7987 (filed Nov. 29, 2007), *Thomas v. United States*, *petition for cert. pending*, No. 07-5209 (filed July 9, 2007), *Mills v. United States*, *petition for cert. pending*, No. 07-5354 (filed July 13, 2007). And the government notably also does not dispute either that no further percolation of the issue is necessary or that only this Court can resolve the conflict of authority.

At a minimum, however, this Court should – as the United States concedes – hold this case pending its decision in *Begay v. United States*, *cert. granted*, No. 06-11543 (Sept. 25, 2007).

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the petition, the petition for a

writ of certiorari should be granted. Alternatively, this Court should either hold this petition pending its disposition of the petitions for certiorari in Nos. 06-10751, *Golden v. United States*, 06-11206, *Chambers v. United States*, 07-61, *Mathias v. United States*, 07-5209, *Thomas v. United States*, 07-5354, *Mills v. United States*, and 07-7987, *Lancaster v. United States*, and/or hold the petition pending its decision in *Begay v. United States*, *cert. granted*, No. 06-11543 (Sept. 25, 2007).

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